No. 89-478

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In The

Supreme Court of the United States

October Term, 1989

STATE OF MARYLAND,

Petitioner,

v.

SANDRA ANN CRAIG,

Respondent.

On Writ Of Certiorari To The Court of Appeals Of Maryland

BRIEF OF AMICUS CURIAE, THE APPELLATE COMMITTEE OF THE CALIFORNIA DISTRICT ATTORNEY'S ASSOCIATION, IN SUPPORT OF PETITIONER

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CONSENT OF PARTIES TO FILE AMICUS CURIAE BRIEF

Amicus Curiae, The Appellate Committee of the California District Attorney's Association, is filing this brief with the written consent of all parties to the above-entitled case. The consent has previously been lodged with the Clerk of Court. (See: Rule 37.3; Rules of the Supreme Court of the United States)

INTEREST OF AMICUS CURIAE

The Appellate Committee of the California District Attorney's Association is a committee created by the District Attorneys of the State of California. It has been established in order to utilize and coordinate the resources of the District Attorneys throughout the state for the purpose of presenting their views on behalf of the People of the State of California in cases which may have major impact upon the prosecution of criminal cases. Upon review of the instant matter – which raises the question of the competing states interests in protecting a child witness from the trauma of face-to-face testimony before a defendant and the defendant's right of confrontation at trial – the committee has concluded that the outcome of this case will have substantial impact upon the administration of criminal justice throughout California. It is for this reason that the committee has filed an Amicus Curiae brief herein.

Amicus, The Appellate Committee of the California District Attorney's Association, join in the views expressed by petitioner, State of Maryland, and the other

Amici in support of petitioner. This Amicus, however, chooses to present a narrowly focused analysis of the case.

The protection of the child witness is an important public policy that demands that procedural devices be utilized to protect the child witness at all stages of the criminal process. A threshold question in any analysis of this important public policy, with respect to the defendant's right to confrontation, is whether the confrontation clause is even implicated. This court's decision in *Coy v. Iowa*, 487 U.S. ___, 101 L.Ed.2d 857 (1988), indicates that procedures such as that used by the State of California – two way closed circuit television – satisfies the defendant's right to confrontation of witnesses without raising issues under the confrontation clause.

Amicus will demonstrate that the Court of Appeals of Maryland erred in concluding that the confrontation clause requires a face-to-face physical confrontation between the defendant and his child accuser. Amicus offers the procedure adopted by the State of California as an example of a method that satisfies the interests of both the accuser and the accused.

OPINION BELOW

The opinion of the Court of Appeals of Maryland is reported as *Craig v. State*, 316 Md. 551, 560 A.2d 1120 (1989).

STATEMENT OF THE CASE

This case arose from an indictment handed down by the Howard County, Maryland, Grand Jury, charging respondent with various offenses involving the sexual abuse of children. Seeking to avoid the trauma to the children necessarily involved in testifying in the direct physical presence of the defendant, the court utilized a Maryland statute whereby the children testified via one-way closed circuit television.

Before utilizing this procedure, a special hearing was held to determine the effect on the children of testifying in the defendant's physical presence. The children did not testify during this hearing; instead the Court based its opinion on expert testimony. The children's testimony was elicited at trial by way of one-way closed circuit television. The jury convicted the respondent of all charges against her.

The Maryland Court of Appeals reversed the conviction. The Court held that the procedures used to determine how the child testified at trial violated the defendant's Sixth Amendment right of confrontation. The Court based its holding on the conclusion that the Sixth Amendment required testimony from the children in the direct physical presence of the defendant. This testimony could occur either at trial or at a pretrial hearing held to determine whether the child would be unable to "reasonably communicate" in the physical presence of the defendant because of the serious emotional distress on the children produced by the presence of the defendant. *Craig v. State*, 316 Md. 551, ___, 560 A.2d 1120, 1127 (1989).

Amicus, The Appellate Committee of the California District Attorney's Association, contends that the Maryland Court erred in requiring the children to be traumatized by testifying in the physical presence of the defendant in a hearing held expressly to avoid that trauma.

SUMMARY OF ARGUMENT

The Sixth Amendment to the United States Constitution provides for a right of confrontation of witnesses against a criminal defendant. An examination of this court's decision in *Coy v. Iowa*, 487 U.S. ___, 101 L.Ed.2d 857 (1988), demonstrates the necessity of a two-step analysis of the confrontation clause. Those two steps consist of first, whether a confrontation has occurred and second, if not, whether an exception exists excusing the lack of confrontation. Amicus addresses primarily the first of those two steps.

The Court below erred in setting forth too strict a definition of confrontation. The Sixth Amendment does not require that a child witness be traumatized by testifying in the physical presence of the accused in a hearing held expressly to avoid that trauma. Confrontation need not consist of an eyeball-to-eyeball direct physical contact. The use of two-way closed circuit television in eliciting the testimony of a child witness constitutes a confrontation. This method of testifying protects all the interests served by the Confrontation Clause.

ARGUMENT

I.

THE SIXTH AMENDMENT REQUIRES THAT IN ALL CRIMINAL PROSECUTIONS THE ACCUSED SHALL ENJOY THE RIGHT TO BE CONFRONTED WITH THE WITNESS AGAINST HIM

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . " U.S. Const.Amend.VI. In prosecutions involving child sexual assault a conflict arises due to the public policy of protecting the child witness.

The Confrontation Clause advances the goal of seeking truth at trial "by insuring that convictions will not be based on the charges of unseen and unknown – and hence unchallengeable – individuals." *Lee v. Illinois*, 476 U.S. 530, 540 (1986). In cases of child sexual assault the challenge is to seek the truth while at the same time protecting the child from unnecessary trauma. This trauma can arise from testifying in the physical presence of the accused about extremely personal and even degrading incidents of sexual assault.

Many states have adopted procedures which allow for the protection of the child witness.[1] California has

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[1] Alaska Stat. Sec. 12.45.046 (Supp.1988); Ariz. Rev. Stat. Ann. Sec. 13-4251 and 13-4253 (Supp.1988); Conn. Gen. Stat. Sec. 54-869 (West Supp.1989); Fla. Stat. Ann. Sec. 92.53 (West Supp.1989); Ga. Code Ann. Sec. 81-1006.2 (Supp.1989); Ind. Code Ann. Sec. 35-37-4-8(d) (Burns Supp.1989); Kan. Stat. Ann. Sec. 22-3434 (1988); Ky. Rev. Stat. Ann. Sec. 421.350 (Baldwin Supp.1989); Md. Cts. & Jud. Proc. Code Ann. Sec. 9-102 (Supp.1988); Mo. Ann. Stat. Secs. 491.680(2) (Vernon Supp.1989); N.H. Rev. Stat. Ann. Sec. 517.13-a (Supp.1988); N.J.

(Continued on following page)

adopted a procedure whereby a child victim under the age of ten may testify via two-way closed circuit television. Cal.Pen.Code Section 1347. (Appendix A) The California Procedure avoids any Confrontation Clause issue by requiring that the alternate method of eliciting testimony from the child victim consist of two-way closed circuit television.

II.

THE CONFRONTATION CLAUSE IS NOT IMPLICATED BY A PROCEDURE BY WHICH A CHILD WITNESS TESTIFIES VIA TWO-WAY CLOSED CIRCUIT TELEVISION

While the decision of the Maryland Court of Appeals addresses many issues, Amicus chooses to examine only a portion of that court's analysis. The Maryland Court erred in presuming that the child must be traumatized by testifying in the physical presence of the accused before adopting a procedure designed to avoid traumatizing the child.

The Maryland Court held that before a court may utilize a procedure involving an alternative to testimony by the child in direct physical presence of the accused in the courtroom it must first hold a hearing featuring precisely such testimony. *Craig*, 316 Md. at ___, 560 A.2d at 1127. "[I]n the face of a confrontation challenge [The Maryland Statute] ordinarily cannot be invoked unless

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Rev. Stat. Sec. 2A:84A-32.4 (West Supp.1989); N.Y. Crim. Proc. Law Secs. 65.00-.30 (McKinney Supp.1989); Ohio Rev. Code Ann. Sec. 2907.41 (Supp.1987); Utah Code Ann Sec. 77-35-15.5 (Supp.1989); Vt. R. Evid. 807; Wis. Stat. Sec. 967.04(7)(a) (Supp. 1988)

the child witness initially is questioned . . . in the defendant's presence, and is found by the trial judge who presided at this procedure to be unable to 'reasonably communicate' because of 'serious emotional distress' produced by the presence of the defendant." *Id.* (citing *Wildermuth v. State*, 310 Md. 496, 523-24, 530 A.2d 275, 289 (1987)).

The Maryland Court defined "in the defendant's presence" as requiring "face-to-face confrontation with the defendant," *Id.* The Court further described this confrontation as "eyeball-to-eyeball," *Id.* Without such direct physical confrontation the court ruled the Sixth Amendment would necessarily be violated.

An examination of this Court's opinion in *Coy v. Iowa*, 487 U.S. ___, 101 L.Ed.2d 857 (1988), compels the conclusion that the Maryland Court construed the presence requirement far too strictly.

The Court in *Coy* left for another day whether any exceptions existed to the requirement of a face to face meeting between an accused and an accuser. *Id.*, at ___, 101 L.Ed.2d at 867. It is clear that the court's opinion, viewed in conjunction with Justice O'Connor's concurrence, establishes that the confrontation required by the Sixth Amendment need not be eyeball-to-eyeball as stated by the Maryland Court.

In her concurring opinion in *Coy*, Justice O'Connor stated, "Initially, many such procedures may raise no substantial Confrontation Clause problem since they involve testimony *in the presence of the defendant*." *Id.*, at ___, 101 L.Ed.2d at 868 (O'Connor, J. concurring) (emphasis added). Among the statutes cited by Justice O'Connor

was section 1347 of the California Penal Code (See Appendix A), which provides for testimony by two-way closed circuit television. The conclusion is inescapable that Justice O'Connor considered testimony via two-way closed circuit television to be "testimony in the presence of the defendant." *Id.*

Justice O'Connor's analysis continued, "Moreover, even if a particular state procedure runs afoul of the Confrontation Clause's general requirements, it may come within an exception that permits its use." *Id.* Therefore, Justice O'Connor provided a two-step analysis. First it is necessary to determine whether a defendant has been denied a confrontation. Only if there has been no confrontation must the court inquire into the availability of an exception.[2] The Maryland Court erred by construing too strictly the confrontation requirement as necessarily consisting of direct physical eyeball-to-eyeball contact. *Craig*, 316 Md. at ___, 560 A.2d at 1127. Confrontation via two-way closed circuit television fully satisfies the Sixth Amendment. It is therefore unnecessary to look for an exception.

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[2] Even if this court concludes that the Confrontation Clause was implicated in *Craig*, it should inquire into any exceptions that may exist. As Justice O'Connor noted, something other than personal confrontation would be permissible if necessary to further an important public policy, such as preventing trauma to child witnesses. "If a court makes a case-specific finding of necessity . . . our cases suggest that the strictures of the confrontation clause may give way to the compelling state interest of protecting child witnesses." *Coy*, 487 U.S. at ___, 101 L.Ed.2d at 869-70 (O'Connor, J. concurring).

Nothing in Justice Scalia's Opinion for the court conflicts with this analysis. The "face-to-face presence" referred to in the Court's Opinion would appear to embrace the use of two-way closed circuit television. The Court's language indicates that the purpose of the clause is served where the witness testifies while looking at the defendant. *Coy*, 487 U.S. at ___, 101 L.Ed.2d at 866. "The Confrontation Clause does not, of course, compel the witness to fix his eyes upon the defendant." *Id.* So long as the witness has the ability to do so, the Confrontation Clause is not implicated. This is precisely why Justice O'Connor and Justice White concurred in the Opinion. *Id.* at ___, 101 L.Ed.2d, at 870, (O'Connor, J. concurring).

III.

TESTIMONY VIA TWO-WAY CLOSED CIRCUIT TELEVISION SERVES ALL THE INTERESTS PROTECTED BY THE CONFRONTATION CLAUSE AND THEREFORE IS A SIXTH AMENDMENT CONFRONTATION

The conclusion of the Maryland Court of Appeal that the Confrontation Clause necessitates "eyeball-to-eyeball confrontation," *Craig*, 316 Md. at ___, 560 A.2d at 1127, errs because testimony via two-way closed circuit television serves all the interests protected by the Confrontation Clause. This court set out, in *California v. Green*, the interests protected by confrontation.

> Confrontation: (1) insures that the witness will give his statements under oath – thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the "greatest legal engine ever invented for the discovery of truth";

> (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.

California v. Green, 399 U.S. 149, 158 (1970).

The use of two-way closed circuit television satisfies each of those interests. *Coy* also observed that the Confrontation Clause furthers the interest of finding the truth by requiring that the defendant and the witness be able to view one another. *Coy*, 487 U.S. at ___, 101 L.Ed.2d at 866. The use of two-way closed circuit television also satisfies these interests.

CONCLUSION

An examination of this court's decision in *Coy v. Iowa* in light of Justice O'Connor's concurring opinion demonstrates the necessity of a two-step analysis to the Confrontation Clause. The first step requires the court to determine whether a confrontation has taken place. The Maryland Court's opinion erred in setting forth a too strict definition of confrontation. This Court's decision in *Coy* compels the conclusion that testimony via two-way closed circuit television is confrontation.

DATED: March, 1990.

Respectfully submitted,

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APPENDIX A

California Penal Code section 1347 reads:

(a) It is the intent of the Legislature in enacting this section to provide the court with discretion to employ unusual court procedures to protect the rights of a child witness, the rights of the defendant, and the integrity of the judicial process. In exercising its discretion, the court necessarily will be required to balance the rights of the defendant against the need to protect a child witness and to preserve the integrity of the court's truthfinding function. This discretion is intended to be used selectively when the facts and circumstances in the individual case present compelling evidence of the need to use these unusual procedures.

(b) Notwithstanding any other provision of law, the court in any criminal proceeding, upon written notice of the prosecutor made at least three days prior to the date of the preliminary hearing or trial date on which the testimony of the minor is scheduled, or during the course of the proceeding on the court's own motion, may order that the testimony of a minor 10 years of age or younger at the time of the motion be taken by contemporaneous examination and cross-examination in another place and out of the presence of the judge, jury, defendant, and attorneys, and communicated to the courtroom by means of two-way closed-circuit television, if the court makes all of the following findings:

(1) The minor's testimony will involve a recitation of the facts of an alleged sexual offense committed on or with the minor.

(2) The impact on the minor of one or more of the factors enumerated in subparagraphs (A) to (D), inclusive, is shown by clear

and convincing evidence to be so substantial as to make the minor unavailable as a witness unless closed-circuit television is used.

(A) Threats of serious bodily injury to be inflicted on the minor or a family member, of incarceration or deportation of the minor or a family member, or of removal of the minor from the family or dissolution of the family, in order to prevent or dissuade the minor from attending or giving testimony at any trial or court proceeding or to prevent the minor from reporting the alleged sexual offense or from assisting in criminal prosecution.

(B) Use of a firearm or any other deadly weapon during the commission of the crime.

(C) Infliction of great bodily injury upon the victim during the commission of the crime.

(D) Conduct on the part of the defendant or defense counsel during the hearing or trial which causes the minor to be unable to continue his or her testimony.

In making the determination required by this section, the court shall consider the age of the minor, the relationship between the minor and the defendant or defendants, any handicap or disability of the minor, and the nature of the acts charged. The minor's refusal to testify shall not alone constitute sufficient evidence that the special procedure described in this section is necessary in order to obtain the minor's testimony.

(3) The equipment available for use of two-way closed-circuit television would accurately communicate the image and demeanor of the minor to the judge, jury, defendant or defendants, and attorneys.

(c)(1) The hearing on a motion brought pursuant to this section shall be conducted out of the presence of the jury.

(2) Notwithstanding Section 804 of the Evidence Code or any other provision of law, the court, in determining the merits of the motion, shall not compel the minor to testify at the hearing; nor shall the court deny the motion on the ground that the minor has not testified.

(3) In determining whether the impact on an individual child of one or more of the four factors enumerated in paragraph (2) of subdivision (b) is so substantial that the minor is unavailable as a witness unless closed-circuit television is used, the court may question the minor in chambers, or at some other comfortable place other than the courtroom, on the record for a reasonable period of time with the support person, the prosecutor, and defense counsel present. The defendant or defendants shall not be present. The court shall conduct the questioning of the minor and shall not permit the prosecutor or defense counsel to examine the minor. The prosecutor and defense counsel shall be permitted to submit proposed questions to the court prior to the session in chambers. Defense counsel shall be afforded a reasonable opportunity to consult with the defendant or defendants prior to the conclusion of the session in chambers.

(d) When the court orders the testimony of a minor to be taken in another place outside of the courtroom, the court shall do all of the following:

(1) Make a brief statement on the record, outside of the presence of the jury, of the reasons in support of its order. While the statement need not include traditional findings of fact, the

reasons shall be set forth with sufficient specificity to permit meaningful review and to demonstrate that discretion was exercised in a careful, reasonable, and equitable manner.

(2) Instruct the members of the jury that they are to draw no inferences from the use of two-way closed-circuit television as a means of facilitating the testimony of the minor.

(3) Instruct respective counsel, outside of the presence of the jury, that they are to make no comment during the course of the trial on the use of two-way closed-circuit television procedures.

(4) Instruct the support witness, outside of the presence of the jury, that he or she is not to coach, cue, or in any way influence or attempt to influence the testimony of the minor.

(5) Order that a complete record of the examination of the minor, including the images and voices of all persons who in any way participate in the examination, be made and preserved on video tape in addition to being stenographically recorded. The video tape shall be transmitted to the clerk of the court in which the action is pending and shall be made available for viewing to the prosecuting attorney, the defendant, and his or her attorney during ordinary business hours. The video tape shall be destroyed after five years have elapsed from the date of entry of judgment. If an appeal is filed, the tape shall not be destroyed until a final judgment on appeal has been ordered. Any video tape which is taken pursuant to this section is subject to a protective order of the court for the purpose of protecting the privacy of the witness. This subdivision does not affect the provisions of subdivision (b) of Section 868.7.

(e) When the court orders the testimony of a minor to be taken in another place outside the courtroom, only the minor, a support person designated pursuant to Section 868.5, a non-uniformed bailiff, and, after consultation with the prosecution and the defense, a representative appointed by the court, shall be physically present for the testimony. A videotape shall record the image of the minor and his or her testimony, and a separate videotape shall record the image of the support person.

(f) When the court orders the testimony of a minor to be taken in another place outside the courtroom, the minor shall be brought into the judge's chambers prior to the taking of his or her testimony to meet for a reasonable period of time with the judge, the prosecutor, and defense counsel. A support person for the minor shall also be present. This meeting shall be for the purpose of explaining the court process to the child and to allow the attorneys an opportunity to establish rapport with the child to facilitate later questioning by closed-circuit television. No participant shall discuss the defendant or any of the facts of the case with the minor during this meeting.

(g) When the court orders the testimony of minor to be taken in another place outside the courtroom, nothing in this section shall prohibit the court from ordering the minor to be brought into the courtroom for a limited purpose including the identification of the defendant or defendants as the court deems necessary.

(h) The examination shall be under oath, and the defendant's image shall be transmitted live to the witness via two-way contemporaneous closed-circuit television.

(i) Nothing in this section shall affect the disqualification of witnesses pursuant to Section 701 of the Evidence Code.

(j) The Judicial Council shall submit a report to the Legislature on or before January 1, 1988, summarizing the experience of courts which have used contemporaneous closed-circuit television pursuant to this section.

(k) The cost of examination by two-way contemporaneous closed-circuit television ordered pursuant to this section shall be borne by the court out of its existing budget. (Added by Stats.1985, c.43, section 1. Amended by Stats.1986, c.774, section 2; Stats.1987, c. 828, section 88.)